No. 3669

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH ROSENTHAL,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

FRANK M. SILVA,
United States Attorney,

ROBERT B. McMILLAN,
Asst. United States Attorney,

WILFORD H. TULLY,
Asst. United States Attorney,

Attorneys for Defendant in Error.

Neal, Stratford & Kerr, S. F. 14921

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STATEMENT OF FACTS.

The plaintiff in error, Joseph Rosenthal, was indicted jointly with Maurice Rosenthal and Arthur F. Fitch in two counts, for violating the terms of the Act of February 13, 1913. The first count, in substance, charged that the defendants

> "did then and there unlawfully, wilfully, knowingly and feloniously buy and receive thirty-nine cases containing five thousand cigarettes each, which said thirty-nine cases of cigarettes were of the approximate value of $1462.50, in lawful money of the United States, and which said thirty-nine cases of cigarettes had theretofore been unlawfully stolen, taken and carried away from a certain railroad car of the Southern Pacific Company, to wit, Car C. E. & I. 35132, by M. H. Young and F. W. La Veque,

> the said thirty-nine cases of cigarettes, at the time they were stolen, taken and carried away, constituting a part of a shipment of freight in interstate commerce over the lines of railroad of the said Southern Pacific Company, and consigned by John Bollman and Company of San Francisco, California, to Coast Cigar Company, Lang and Company, Park Cigar Company, and T. W. Jenkins, all of Portland, Oregon; that at the time and place aforesaid the said defendants then and there well knew that the said thirty-nine cases containing five thousand cigarettes each had been theretofore stolen, taken and carried away from said railroad car, as aforesaid."

The second count of the indictment is substantially the same as the first, except that instead of it being charged that the defendants did "feloniously buy and receive" the said cigarettes, it is charged that they did "feloniously receive and have in their possession, knowing the same to have been stolen", the said cigarettes.

All the defendants were acquitted on the first count, and on the second count Joseph Rosenthal, the plaintiff in error, alone was found guilty.

The plaintiff in error, in his brief, has raised five points why the judgment of the Court below should be reversed. The contentions are as follows:

1st: That the acquittal on the first count of the indictment is tantamount to an acquittal on the second.

2nd: That there is want of any evidence to sustain a verdict against Joseph Rosenthal.

3rd: That the evidence is insufficient to sustain the verdict.

4th: That the verdict was inconsistent and contradictory.

5th: That the evidence discloses that it is at least as consistent with innocence as with guilt.

In reply to these contentions we will discuss the first and fourth contentions together, in view of the fact that they rest upon the same argument. We will likewise discuss the second, third and fifth contentions together, for the reason that they involve a discussion of the same evidence.

ARGUMENT.

I.

THE ACQUITTAL OF THE PLAINTIFF IN ERROR UPON THE FIRST COUNT IS NOT TANTAMOUNT TO AN ACQUITTAL ON THE SECOND COUNT.

It is well established that two offenses may be committed in the same transaction, and that the acquittal of either one of the offenses does not relieve the defendant from punishment under the other offense.

> *Morgan v. Devine,* 237 U. S., at 632;
> 59 L. Ed., 1054.

The Act of February 13, 1913, makes the purchase of stolen goods, with knowledge that they are stolen, one offense, and the receipt or possession of the same goods known to have been stolen separate offenses, distinct from the offense committed by the purchase of the same goods.

> *U. S. v. Sullivan,* 250 Fed. Rep., at 632.

The argument of the plaintiff in error that the acquittal on the first count of purchasing the goods was tantamount to an acquittal of him on the second

count, is based upon the assumption that an acquittal on the first count is a determination that none of the necessary elements existed to prove the crime charged. The acquittal on the first count is not a determination that none of the necessary elements existed to prove the crime, but merely that all of them were not proved. There is an acquittal only of the charge that the plaintiff in error both purchased and received the goods, but there is no acquittal of the charge that he received or had in his possession the goods. The jury could well find that the plaintiff in error received or had in his possession the stolen cigarettes, knowing them to have been stolen, and yet refused to believe that he had purchased and received the stolen cigarettes knowing them to have been stolen. The facts in the case at bar indicate that the jury was justified in reaching their verdict. The record shows that the purchase of the cigarettes was never completed, but that Joseph Rosenthal contracted to purchase two and one-half million cigarettes, and that thirty-nine cases of five thousand each were delivered and never paid for. Transcript, page 60, page 95.

While the purchase of the cigarettes was never completed, yet the record does show, beyond any question, that Joseph Rosenthal, the plaintiff in error, was the General Sales Manager and also the Purchasing Agent of the Pacific Sales Company, and as such officer contracted to purchase the cigarettes, fixed the time and the place of delivery, and the thirty-nine cases of cigarettes, with whose receipt and possession he is charged, were delivered at the time and place indicated by the terms of the contract entered into and signed by him. Transcript 116, pages 57-58; page 95.

II.

THERE IS AN ABUNDANCE OF EVIDENCE TO SUSTAIN THE VERDICT OF THE JURY.

The contention of the plaintiff in error is that he did not know the cigarettes were stolen, and that he was merely an employe of Maurice Rosenthal, the owner and proprietor of the Pacific Sales Company, in whose behalf the cigarettes in the case at bar were purchased, and that as such employe he could not be deemed to have received or had in his possession the cigarettes. This is probably based upon a misapprehension as to the facts in the record. The testimony of Joseph Rosenthal himself is that he not only was the Purchasing Agent for the Pacific Sales Company, but that he also was the General Sales Manager of his father's firm. Transcript, page 16. An inspection of the record discloses that Joseph Rosenthal was the person who drafted the contract of purchase, who fixed the terms of the contract, who prescribed the time and place of delivery, who fixed the price to be paid, and who finally affixed his signature to the contract and bound the Pacific Sales Company. Transcript, pages 57-58-59-60-127-128-129-37 and 56. He must have been more than a mere employe if he had power to bind the company by his signature.

Joseph Rosenthal, at the time he entered into this contract of purchase must have known that the cigarettes that he was contracting to purchase were stolen goods, for we find in the contract itself this provision, dictated and inserted in there by the plaintiff in error.

> "The seller, F. W. Burke, guarantees the cigarettes to be in first-class salable condition, *also guarantees that these cigarettes were not obtained in any illegal manner or in violation of any Federal, state or local law or statute* and gives to the Pacific Sales Company a clear Bill of Sale to the same with each delivery."

Not only did Joseph Rosenthal know at that time that the goods he was purchasing were stolen, but the record also shows that his father, Maurice Rosenthal, whom he was constantly consulting, had knowledge that goods purchased from the same parties that Joseph Rosenthal was dealing with were stolen, for we find him addressing a communication to the Pacific Sales Company at Sacramento containing the following advice:

> "I am in receipt of yours of September 30th, but before sending you a check for $1040 for these cigarettes which you purchased, we want to make sure that those cigarettes are not stolen, and that the man is entitled to those goods, as I do not want to buy stolen goods, no matter what profit we can make on same." Transcript, page 63.

The next paragraph of same letter shows that he was perfectly willing to wink at the origin of the goods if necessary.

> "P. S.—If the party you purchased these cigarettes from is willing to sign an affidavit or even this letter that the goods have been purchased by him and that there is nothing owing for the cigarettes, or in other words, if he has a clear title to same, have him sign this letter and return same to us." Transcript, page 63.

The record shows that in spite of the fact that the plaintiff in error thus had knowledge that the goods he was purchasing were stolen, he made no effort

to investigate the character of the men he was dealing with, the origin of the goods he was purchasing, or require any references of the sellers. His only effort in this regard was to ask Mr. La Veque on one occasion whether the cigarettes were Government goods, and on this occasion he did not give Mr. La Veque, as he admits (Transcript 121) an opportunity to answer his inquiry, but made the remark that he thought the cigarettes were Government goods "but it didn't make any difference at this price." Transcript, page 69, page 70.

It must be borne in mind that the men the plaintiff in error was dealing with were two roughly dressed railroad laborers, who had no established business, and from their appearance one could easily surmise that they could not have been the lawful possessors of so large a quantity of cigarettes as two and one-half million. Transcript, page 36, page 55.

Not only was plaintiff in error purchasing the cigarettes from two unknown laborers, but he was purchasing them at a ridiculously low price, approximately one-half the wholesale market price for such cigarettes. Transcript pages 28, 41.

In spite of the fact that the contract provided for the purchase of a great number, namely, two and one-half million cigarettes, and for the furnishing of a Bill of Sale upon each delivery, still the plaintiff in error made no effort to procure any bills of sale or to exact any guarantee or request any reference from the parties with whom he was contracting. Transcript, page 127.

The Honorable Judge William C. Van Fleet, of the District Court for the Northern District of California, while a Justice upon the Supreme Court of the State of California, rendered a decision which is

quite applicable to the facts as disclosed by the record in the case at bar,

People v. Clausen, 120 Cal., at 381:

> "Whether the defendant knew that the goods were stolen is to be determined by all the facts of the case. It is not necessary that he should have heard the facts from eyewitnesses. He is required to use the circumspection usual with persons taking goods by private purchase; and this is eminently the case with dealers buying at greatly depreciated rates. That which a man in the defendant's position ought to have suspected he must be regarded as having suspected, as far as was necessary to put him on guard and on his inquiries. The proof in any case is to be inferential, and among the inferences prominent are inadequacy of price, irresponsibility of vendor or depositor."

The record shows that the evidence is anything but consistent with the innocence of the plaintiff in error.

We respectfuly submit that the judgment of the District Court should be affirmed.

FRANK M. SILVA,
United States Attorney,

ROBERT B. McMILLAN,
Asst. United States Attorney,

WILFORD H. TULLY,
Asst. United States Attorney,

Attorneys for Defendant in Error.

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

JOSEPH E. BIEN,
Attorney for Plaintiff in Error.

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The statement of the case is fully set forth in the Opening Brief for Plaintiff in Error.

Argument.

I.

THE ACQUITTAL OF THE PLAINTIFF IN ERROR UPON THE FIRST COUNT IS TANTAMOUNT TO AN ACQUITTAL ON THE SECOND COUNT.

There is no fault to be found with the statement of the United States Attorney that it is well established that two offenses may be committed in the same

transaction and that the acquittal of either one of these offenses does not relieve the defendant from punishment for the other offense; and cases cited upon this statement are correct exposition of the law.

There can be no question, however, as stated in the Opening Brief for Plaintiff in Error, that the Jury must have found by their verdict that none of the defendants *knew these cigarettes had been stolen* at the time they were bought and received. This being true, how was it possible upon the evidence for the Jury to conclude that Plaintiff in Error, Joseph Rosenthal, *knew that they had been stolen* when they were received and passed into the possession of defendant Fitch?

The statute (Act of February 13, 1913, ch. 50) defines the crime. It is "buying, receiving *or* having in possession" stolen property, with knowledge of its stolen character.

Any one of these acts, buying or receiving or having in possession, constitutes the crime, and all three together can charge no more.

Plaintiff in Error having been acquitted on the first count of buying and receiving, was necessarily acquitted of "receiving". Acquitted of receiving the property, he could not be held on the second count of "receiving and having in his possession", for he could not have had it in his possession if he did not receive it.

It will be remembered that the only connection that Joseph Rosenthal had with the transaction was the taking of the bill of sale on the 31st of October, 1919. After that bill of sale was taken, Joseph Rosenthal left Sacramento and had nothing further to do with, or knowledge of, the transaction.

The testimony shows beyond question and without dispute that the cigarettes were delivered to Fitch at Sacramento. Joseph Rosenthal was not present; he knew nothing of the delivery; he never saw the goods after they were delivered and the only knowledge that he is shown to have had that they were delivered is when they were produced in the Court-room on the trial of the case. It is shown that even then he did not know anything of the goods until the United States Attorney told him that they were the cigarettes which had been recovered from the store at Sacramento.

It appears without dispute that the cirgarettes were stolen on the 7th of November—eight days after the Plaintiff in Error made the contract of purchase. Necessarily, it must follow that he could not know that the goods were stolen on the day of the contract of purchase for they were not stolen until afterwards. This, taken in connection with the fact that the Jury found him not guilty of purchasing and receiving the goods, shows he could not have received the goods and had them in his possession, knowing them to have been stolen. The verdict was contradictory and inconsistent.

Edwards v. United States, 266 Federal 848.

II.

THERE IS NO EVIDENCE TO SUSTAIN THE VERDICT OF THE JURY.

The Pacific Sales Company is not a corporation, an association of persons, or a partnership. It is nothing but a trade-name used by Maurice Rosenthal (one of the acquitted defendants) in the conducting of the business, he being the sole proprietor. The evidence affirmatively shows this without dispute. Arthur Fitch (the other of the acquitted defendants) was an employee of Maurice Rosenthal, acting only as manager of the Sacramento store. The Plaintiff in Error, Joseph Rosenthal, was also an employee of Maurice Rosenthal, acting as general sales manager in purchases and sales.

The United States Attorney in his brief makes the statement—

> "He (Joseph Rosenthal) must have been more than a mere employee if he had power to bind the company by his signature".

This statement, however, takes it for granted that Joseph Rosenthal did bind the company by his signature, concerning which there is no evidence. The testimony shows that Joseph Rosenthal had no right to make the contract on behalf of his father, Maurice Rosenthal, doing business under the name of Pacific Sales Company, until he was first specially authorized so to do. The testimony shows that before making the contract he called his father on the telephone and obtained such authority. There

is no testimony to show that there was a "company". The sole principal in the whole transaction was Maurice Rosenthal.

Again, the United States Attorney states—

> "Joseph Rosenthal, at the time he entered into this contract to purchase, must have known that the cigarettes that he was contracting to purchase were stolen goods, for we find in the contract itself this provision, dictated and inserted in there by the Plaintiff in Error * * * * 'Also guarantees that these cigarettes were not obtained in any illegal manner or in violation of any Federal, State or local law or statute.' "

The answer to this statement is that Joseph Rosenthal, at the time he entered into this contract to purchase, October 31st, could not have known that the cigarettes he was contracting to purchase were stolen, for the reason that the thieves did not steal them until November 7th—eight days after the contract was made. Upon what theory the United States Attorney contends that the guarantee contained in the contract of purchase that the cigarettes were not obtained in any illegal manner or in violation of any law, is proof that Joseph Rosenthal knew the cigarettes were stolen, does not appear; and the answer to this statement is that the Jury did not so believe, because they found the Plaintiff in Error, Joseph Rosenthal, not guilty of receiving and purchasing the cigarettes knowing them to have been stolen.

The United States Attorney makes the further statement—

> "Not only did Joseph Rosenthal know at that time that the goods he was purchasing were stolen, but the record also shows that his father, Maurice Rosenthal, whom he was constantly consulting, had knowledge that goods purchased from the same parties that Joseph Rosenthal was dealing with were stolen, for we find him addressing a communication to the Pacific Sales Company at Sacramento, containing the following advice: 'I am in receipt of yours of September 30th, but before sending you a check for $1040 for those cigarettes which you purchased, we want to make sure that those cigarettes are not stolen and that the man is entitled to those goods, as I do not want to buy stolen goods no matter what profit we can make on same.' "

The testimony does not show that this letter was ever brought to the attention of Plaintiff in Error, Joseph Rosenthal. How it is possible that Maurice Rosenthal knew that the goods that Joseph Rosenthal was purchasing on the 31st of October were stolen, because in relation to a transaction thirty days before he insisted that his buyer should make sure that the cigarettes were not stolen, does not appear. Again, it will be remembered that Maurice Rosenthal was acquitted upon both counts, the Jury necessarily finding that he had no knowledge that any of the goods were stolen.

It is apparent that the entire argument contained in the brief of the United States Attorney for De-

fendant in Error has application only to the first count of the indictment, viz:

"buying and receiving"

but upon this count Plaintiff in Error was acquitted. The argument for Defendant in Error does not point out any evidence upon which the conviction,

"Did receive and have in his possession"

could be sustained.

In order to show that Plaintiff in Error, Joseph Rosenthal,

"Did receive and have in his possession"

the cigarettes in question, it was incumbent upon the prosecution to produce evidence that he exercised control or dominion over the goods. There is no evidence to show that he had them in his actual or constructive possession, that he could have taken them into his possession, or that he had any control over them whatever, except as directed by the proprietor and sole owner of the Pacific Sales Company, Maurice Rosenthal. The testimony shows without dispute that the actual delivery was made to Fitch; that Fitch had the actual possession, under the direction and control of Maurice Rosenthal; yet we find both Fitch and Maurice Rosenthal acquitted on both counts of the indictment and Plaintiff in Error, Joseph Rosenthal, who had less to do with the transaction than either Fitch or Maurice Rosenthal, convicted of "having in his

possession'' goods that he never saw and over which he had no control of any kind. Upon the evidence produced as to the only connection Joseph Rosenthal had with the transaction, viz., the making of the contract of purchase, we find him acquitted by the Jury of "buying and receiving".

It is respectfully submitted that the entire record clearly shows that the acquittal upon the first count is tantamount to an acquittal upon the second count, and that there is no evidence to sustain the verdict of the jury, convicting Plaintiff in Error on the second count.

Dated, San Francisco,
October 29, 1921.

JOSEPH E. BIEN,
Attorney for Plaintiff in Error.